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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MARK S. SOKOLSKY,

Plaintiff and Appellant,

v.

PETER BRESLER, et al.,

Defendants and Respondents.

F056485

(Super. Ct. No. 07CECG04187)

OPINION

APPEAL from an order of the Superior Court of Fresno County. Donald S. Black, Judge.

Mark S. Sokolsky, in propria persona, for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Steven M. Gevercer and Catherine Woodbridge Guess, Deputy Attorneys General, for Defendants and Respondents.

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Plaintiff Mark S. Sokolsky, who is civilly confined at Coalinga State Hospital, filed a civil lawsuit against two of the hospital's physicians, Peter Bresler, M.D. and Johnny Dang, M.D. (collectively defendants) for deliberate indifference to his serious medical needs and medical malpractice. Defendants moved to have plaintiff declared a vexatious litigant and require him to furnish security before being allowed to proceed

with the lawsuit. The trial court granted defendants' motion pursuant to Code of Civil Procedure[1] sections 391 to 391.4 and when plaintiff failed to furnish security as ordered, dismissed the lawsuit. Plaintiff appeals, in propria persona, contending the trial court's finding that he is a vexatious litigant is not supported by substantial evidence. We will affirm.

FACTUAL AND PROCEDURAL HISTORIES

Plaintiff's original complaint, filed in December 2007 in Fresno County Superior Court, alleged causes of action for deliberate indifference to his serious medical needs and medical malpractice. Specifically, plaintiff alleged he sustained a bacterial infection after Dr. Bresler refused to issue him contact lens cleaning solution, which led to corneal ulcers, and both defendants refused to treat either his corneal ulcer or his infection.

In May 2008, defendants filed a motion to declare plaintiff a vexatious litigant and require him to post a $5,500 security deposit. The motion was made on the ground that plaintiff was a vexatious litigant as defined by statute because "[i]n the preceding seven years, plaintiff in prop[]ria has commenced, prosecuted or maintained in excess of five matters in United States District Court, Central District of California" which were "finally determined adversely to plaintiff." Defendants also requested plaintiff be ordered to post security as he did not have a reasonable probability of prevailing in this lawsuit,[2] and sought a pre-filing order under section 391.7 to require plaintiff to obtain leave of court before commencing any new litigation.

Defendants' motion included the declaration of Catherine Guess, a deputy attorney general representing defendants, which set forth court records of sixteen cases she

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[1] All further statutory references are to the Code of Civil Procedure.

[2] In their opposition, defendants stated there was a first amended complaint which alleged defendants were deliberately indifferent to plaintiff's serious medical needs. The first amended complaint, however, is not included in the clerk's transcript and is not part of the appellate record.

asserted were finally determined adversely to plaintiff. The motion was also supported by defendants' declarations. Both Dr. Dang and Dr. Bresler stated that they were licensed medical doctors working for the Department of Mental Health at Coalinga State Hospital, at all relevant times they treated plaintiff in accordance with the appropriate community medical care standards and did not refuse him medical treatment they believed he needed or knowingly disregard a serious medical risk to him.

Plaintiff filed an opposition to the motion, in which he argued he did not qualify as a vexatious litigant. Plaintiff also filed a request for judicial notice, in which he asked the court to take judicial notice of court documents filed in several of his prior cases and recounted events pertaining to four of his prior cases.

At the hearing on the motion, the court granted plaintiff's request for leave to submit additional declarations. After plaintiff submitted the additional declarations, the trial court took the matter under submission. The trial court, after taking judicial notice of the documents plaintiff submitted, subsequently issued a written order granting the motion.

On the question of whether plaintiff was a vexatious litigant as defined in section 391, the trial court noted defendants were seeking to have plaintiff declared a vexatious litigant under section 391, subdivision (b)(1), and found the exhibits defendants provided showed there were "at least five actions that have been 'finally determined adversely' to plaintiff within the last five years, as required by Code of Civil Procedure § 391(b)(1)." Although defendants had provided exhibits from 16 cases they asserted plaintiff had commenced or maintained, the trial court did not count four of them, finding that three of the cases involved writs of habeas corpus, which it explained do not count in making a vexatious litigant determination, and in the fourth case, it was not apparent from the document provided that plaintiff was involved in that litigation. With respect to the remaining cases, the trial court found that while four of them were terminated after the courts denied plaintiff's requests for fee waivers, those cases could be counted as having

been finally determined adversely to plaintiff since the denials were based on reasons substantively related to the cases themselves as opposed to an analysis of plaintiff's income and inability to pay the fees. The trial court determined that even if those four cases were not counted, there were still eight cases that were finally determined adversely to plaintiff.

On the question of whether to require plaintiff to post security, the trial court concluded there was no reasonable probability of plaintiff's success in the lawsuit. The court noted the only cause of action remaining was plaintiff's claim under United States Code sections 1983 and 1985 for damages as a direct result of defendants' deliberate indifference to plaintiff's serious medical needs. The trial court found that plaintiff's evidence, comprised of the verified complaint, his declaration and the declarations of other patients, did not support his claim, but instead showed defendants were attempting to provide adequate care, and he and defendants merely had a difference of opinion about medical care and treatment, which does not support a deliberate indifference claim. In addition, the trial court weighed plaintiff's evidence against defendants' evidence and concluded plaintiff had not shown either that the course of treatment defendants chose was medically unacceptable under the circumstances or that they chose this course in conscious disregard of an excessive risk to plaintiff's health.

For these reasons, the trial court concluded plaintiff was not likely to prevail in his litigation against defendants and, based on this finding, ordered plaintiff to post a $5,500 bond as a condition of proceeding with prosecution of the lawsuit. The order expressly warned plaintiff that if he failed to post a bond within a reasonable time, the action would be dismissed. The trial court also issued a pre-filing order pursuant to section 391.7, which prohibits plaintiff from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed.

When plaintiff failed to post the bond, the trial court dismissed the action with prejudice. We granted plaintiff's request for permission to file a notice of appeal challenging the trial court's order declaring him a vexatious litigant and dismissing the action.

DISCUSSION

Standard of Review

"A court exercises its discretion in determining whether a person is a vexatious litigant. [Citation.] We uphold the court's ruling if it is supported by substantial evidence. [Citations.] On appeal, we presume the order declaring a litigant vexatious is correct and imply findings necessary to support the judgment." (*Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 219 (*Bravo*).) Similarly, a court's decision that a vexatious litigant does not have a reasonable probability of success is based on an evaluative judgment in which the court is permitted to weigh evidence. (*Moran v. Murtaugh, Miller, Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 785-786 (*Moran*).) A trial court's conclusion that a vexatious litigant must post security does not terminate the action or preclude a trial on the merits; it merely requires the plaintiff to post security. Accordingly, if there is any substantial evidence to support a trial court's conclusion that a vexatious litigant has no reasonable probability of prevailing in the action, it will be upheld. (See *Moran*, *supra*, at pp. 784-786.)

Vexatious Litigant Statute

"The vexatious litigant statute (§§ 391-391.7) was enacted in 1963 to curb misuse of the court system by those acting in propria persona who repeatedly relitigate the same issues. Their abuse of the system not only wastes court time and resources but also prejudices other parties waiting their turn before the courts." (*In re Bittaker* (1997) 55 Cal.App.4th 1004, 1008 (*Bittaker*).) The statute provides a "means of moderating a vexatious litigant's tendency to engage in meritless litigation." (*Bravo*, *supra*, 99 Cal.App.4th at p. 221.) "'The statute defines a "vexatious litigant," provides a procedure

in pending litigation for declaring a person a vexatious litigant, and establishes procedural strictures that can be imposed on vexatious litigants. A vexatious litigant may be required to furnish security before proceeding with the pending litigation; if that security is not furnished, the litigation must be dismissed. (§§ 391.3, 391.4.)'" (*Singh v. Lipworth* (2005) 132 Cal.App.4th 40, 44, quoting *Bittaker, supra*, at p. 1008.)

There are four separate bases for designating a plaintiff to be a vexatious litigant. (§ 391, subd. (b).) The plaintiff's litigation conduct must fall within one of these definitions. (See, e.g., *Holcomb v. U.S. Bank Nat. Assn.* (2005) 129 Cal.App.4th 1494, 1501.) Here, the trial court found plaintiff was a vexatious litigant under section 391, subdivision (b)(1), which provides, in pertinent part, that a court may declare a person to be a vexatious litigant who, in "the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been … finally determined adversely to the person…." (§ 391, subd. (b)(1).) The term "litigation" means "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (§ 391, subd. (a).) Litigation includes an appeal or civil writ, but does not include petitions for writs of habeas corpus. (*McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1216; *Bittaker, supra*, 55 Cal.App.4th at p. 1012.) A case is finally determined adversely to a plaintiff if he does not win the action he began, including cases which the plaintiff voluntarily dismisses. (*Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775, 779-780; *In re Whitaker* (1992) 6 Cal.App.4th 54, 56.)

Section 391.1 provides as follows regarding a motion to furnish security: "In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he will prevail in the litigation against the moving defendant." Section

391.3 sets forth the basis for granting the motion: "If, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix." If security is ordered by the court and is not furnished by the plaintiff, "the litigation shall be dismissed as to the defendant for whose benefit [the security] was ordered furnished." (§ 391.4.)

Vexatious Litigant Finding

Here, the trial court found plaintiff to be a vexatious litigant under section 391, subdivision (b)(1) based, in part, on eight prior cases that were determined adversely to plaintiff in the seven years before defendants' motion was filed on May 22, 2008. Those cases are: (1) *Sokolsky v. Cooley*, U.S. District Court, Central District of California, case No. CV 04-00930 CBM (AN); (2) *Sokolsky v. County of Los Angeles*, U.S. District Court, Central District of California, case No. CV 01-05219 JFW (AN); ; (3) *Sokolsky v. Baca*, U.S. District Court, Central District of California, case No. CV 02-03521 CBM (AN); ; (4) *Sokolsky v. Korpi*, U.S. District Court, Eastern District of California, case No. CIV S-00-1832 DFL DAD P; (5) *Sokolsky v. County of Los Angeles*, U.S. District Court, Central District of California, case No. CV 00-7630 CBM (AN); (6) *Sokolsky v. University of Southern California*, Superior Court of Los Angeles County, case No. BC371332; (7) *Sokolsky v. Thornton*, Superior Court of Los Angeles County, case No. BC323603; and (8) *Sokolsky v. Madrid*, Superior Court of Los Angeles County, case No. BC244070. These findings are supported by substantial evidence in the form of copies of pleadings or rulings by the trial court on the above actions, so they must be upheld on appeal. (*Bravo, supra*, 99 Cal.App.4th 211, 219.)

Citing *Morton v. Wagner* (2007) 156 Cal.App.4th 963 (*Morton*), plaintiff contends the trial court erred when it decided he was a vexatious litigant because there is

insufficient evidence he "filed a number of insufficiently grounded actions, with the intention of harassing and/or annoying the defendants against which he complained." He further asserts he cannot be a vexatious litigant because none of his prior filings were groundless or unmeritorious. Plaintiff's reliance on *Morton* is misplaced, as the issue in *Morton* was whether the plaintiff was a vexatious litigant under section 391, subdivision (b)(3), which defines a vexatious litigant as one who "repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay." (*Morton, supra,* 156 Cal.App.4th at pp. 969-970.) Here, however, the trial court determined plaintiff was a vexatious litigant under section 391, subdivision (b)(1). Accordingly, section 391, subdivision (b)(3) is inapplicable in this matter.[3]

Plaintiff also contends that because his filings were not as numerous as the plaintiffs in other cases, he is not a vexatious litigant. It is enough, however, that plaintiff satisfied the criteria set forth in section 391, subdivision (b)(1), i.e. that in the immediately preceding seven-year period, he commenced, prosecuted or maintained in propria persona at least five litigations that have been finally determined adversely to him. The trial court's findings that he had satisfied these criteria are supported by substantial evidence.

Plaintiff states in his opening brief that he also is challenging the requirements to post a bond and obtain a pre-filing order, but does not set forth any argument or cite any authority on these issues. Accordingly, we deem plaintiff to have abandoned any challenge to these orders. Courts ordinarily will treat an appellant's failure to raise an issue in his or her opening brief as a waiver of that challenge. (*Tisher v. California*

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[3] Plaintiff's reliance on *Wilson v. Murillo* (2008) 163 Cal.App.4th 1124 is also misplaced, as that case did not involve the issue of whether the plaintiff was a vexatious litigant under section 391.

Horse Racing Bd. (1991) 231 Cal.App.3d 349, 361.) Plaintiff's conclusory statements in his opening brief do not preserve the issues for appeal. (See *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316, fn. 7 ["'Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived.'"]) Plaintiff's belated attempt to address these issues in his reply brief does not salvage these abandoned issues. (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894-895, fn. 10 [arguments raised by appellant for the first time in reply brief generally not considered, absent good reason for failing to present them earlier]; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764 [issue raised for first time in reply brief generally not considered, "'because such consideration would deprive the respondent of an opportunity to counter the argument'"].)

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

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Gomes, J.

WE CONCUR:

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Cornell, Acting P.J.

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Dawson, J.